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ABSTRACT

A survey of court litigation traces the development of case law regarding the substantive rights of elementary and high school students in relation to school board rules and regulations. The survey reveals the gradual "judicialization" (conversion of conflicts into court cases) of educational governance and the delimiting of the school board's "limited monarchy." In the 19th century there were few cases. They dealt with attendance, student conduct, school rules, corporal punishment, parental authority, and, at the end of the century, vaccination. In most cases the conflict had more to do with parents and their rights in relation to the school board than with the students' own rights. Cases became moderately more common in the early 20th century, up through the early 1960s. The issues involved included vaccination, student fraternities, and married students. The mid-1960s through the early 1970s saw an eruption of student rights cases, mostly about personal grooming (specifically, hair length). Unlike earlier cases, these concerned constitutional issues of personal liberty and were tried in federal courts. A table covering the years 1899-1978 presents data by decades on the number of student rights cases, the national rate of cases per pupil, the percentage won by students, the proportion in federal court, and the most common issues. (RW)

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LIMITED MONARCHY: THE RISE AND FALL OF STUDENT RIGHTS

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Abstract

This paper traces the development of the case-law relating to student rights--which is defined here as lawsuits by or on behalf of students, challenging rules of a school or school system. These cases were rare in the 19th century, and continued to be relatively uncommon until the 1960s. At this point there was an eruption of student rights cases. Many of these raised constitutional issues, and were brought in federal court. The single most litigated issue was personal grooming (hair length, specifically). This particular issue has died back; but the judicialization of educational governance persists, both legally and socially. The cases also probably influenced legalization of the schools themselves, that is, the process of transforming informal norms to formal ones in educational institutions.

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Student Rights

This is a survey of reported cases on what, for want of a better term, we will call student rights. These are suits, by or on behalf of public school students, challenging rules or practices of local school boards, principals or teachers. We will stick to cases about elementary and high school pupils and to cases about substance, that is, about what the rules say, rather than about procedures for handling disciplinary problems. The cases can be, we think, quite revealing. They shed considerable light on the relationship between law and public education.

We will begin with a 19th century illustration -- one of the rare reported cases of its day. A teacher in Tennessee, James Anderson, was indicted for assault and battery. He had been drilling his class when

young Wyatt Layne spoke softly out of turn. Anderson kept the boy after class, and then gave him a whipping: "He hit him about a dozen licks with a switch . . . struck him pretty hard, Layne crying all the time."

Anderson was convicted in the trial court; the Supreme Court of Tennessee affirmed. Young Wyatt's offense had been "slight and entirely unintentional." The teacher's cruelty was "an unauthorized exercise of power." A teacher has discretion, but he must not abuse it. He can use the rod but not "wantonly and without cause." Punishment must be moderate; the student is "helpless" and in the teacher's power. When a teacher goes too far, "courts must afford a proper redress, and prevent the temptation from being presented to parents and relations to take vengeance into their own hands. The government of the school should be patriarchal rather than despotic. If it be a monarchy, it should be a limited one, and not absolute."_1_/

Our theme is this limited monarchy: the role of courts in providing, on behalf of students, limits to teacher and school board power. One caution: despite the court's language, we know little about students' rights in practice. Only appellate cases get reported. They may be the tip of an iceberg. No experience or rule of thumb tells us how to estimate numbers of trials from numbers of appeals. We are even more in the dark about the real world of the classroom.

Cases do tell us, of course, about some events inside the <u>legal</u> system. They are an index, for example, of <u>judicialization</u>. We can define <u>judicialization</u> as the process of converting disputes or conflicts into court cases. Frequently, we can distinguish three stages

of a process, and we see one here as well. First is a stage of authority and discretion, of pre-judicialization. Decisions made by teachers and school boards go largely unquestioned. Second is the stage of challenge, or, in a sense, of judicialization itself. This occurred in the late 1960's, with a bulge of cases on student rights, mostly in federal court. The wave of cases now seems to be subsiding. The third stage is the stage of absorption. Institutions digest and accommodate the doctrines the courts have worked out, and develop new grievance procedures. At this point litigation on the issue dies down.

This is a typical and common pattern, but of course not the only one. The process can become "stuck" before reaching the third stage. The stages in other words are by no means inevitable. Institutions and social groups must acquiesce in some kind of solution. If schools had continued to struggle over hair length (say), or if courts had been unable to agree on lines of doctrine which the schools could absorb, we might still be stuck at stage two.

Here, as always, social forces pull the strings. The great hair length fuss would have been unthinkable a century ago. And it is an issue that played itself out; the symbolic meaning of hair length dribbled away. Men's hair got longer in the general population and the issue disappeared. For school desegregation, busing, and the like, no such happy outcome can be expected, at least not in the short run.

Students' Rights: The 19th Century Prologue

19th century cases are few and far between, but are often of uncommon interest. One point has to be made at the outset. "Student rights" cases in the 19th century usually had little to do with the feelings of students. Overwhelmingly the rights of parents were at issue. The children were minors, and their parents prosecuted the suits. (Strong-minded high school students are more a feature of our own generation.)

In one small, rather anomalous group of cases, the issue was whether or not a child had the right to attend some particular school. These are cases on the student's right to be admitted or readmitted. There are also cases about expulsion. Some cases turn on rules of the school board. In Board of Education v. Bolton (1899), 2 / a rule prohibited children who had just turned six from entering the school at any time except during the first months of the fall and the spring terms. The court held the rule was unreasonable, and struck it down.

A school rarely, if ever, keeps a student out merely because of whim. Usually, some issue of student conduct lurks in the background. In one Massachusetts case, in 1893, the student was excluded from school because he was weak-minded, "troublesome to other children," made "uncouth noises," pinched others, and could not "take ordinary, decent physical care of himself." In another Massachusetts case, a girl was excluded from school because she was "immoral," and "pursued a course of open and notorious familiarities, and actual illicit intercourse,

and that for hire and reward." In still another Massachusetts case, the court allowed the exclusion of a student guilty of "whispering, laughing, acts of playfulness and rudeness to other pupils, inattention to study," and other distracting conduct._3_/

The school board did not win all its cases. Courts sometimes threw out "unreasonable" rules. In a Wisconsin case, a school required each pupil to bring in a stick of wood after recess. A father complained that his son, who had diphtheria, could not carry the wood. The rule was held unreasonable._4_/ Courts were reluctant, however, to let parents sue school boards for damages. In one case, in Indiana (1887), a 10 year old girl was late for school in the middle of January. The temperature was 18 degrees below zero. When she reached school, she found herself locked out. She had to walk back home, and suffered frostbite. Her parents lost the case against the school system._5_/

A small group of cases deals with corporal punishment. Courts did not question the right of school teachers to take a switch to their pupils. The question was, how far could they go. Punishment should not be "excessive." In a New Hampshire case, Heritage v. Dodge (1886),_6_/ the teacher whipped a student because the student coughed and made cough-like noises to attract attention. The student claimed he had whooping cough. The teacher was held not liable. He may have made a mistake; but so long as he acted in good faith and without malice, the law did not require him to be "infallible." In an Indiana case, decided in 1888, the pupil, Edward Patrick, 16, was obviously a trouble-maker. He "made some antic demonstrations which created a general laugh," and later walked off with the teacher's overcoat. The

teacher, Tyner Vanvactor, was only 18 himself. He consulted the township trustees, and they told him to give Patrick his choice: whipping or expulsion. Patrick chose the whipping. There was some dispute about how hard he was beaten. (He was whipped with "a green switch...about three feet long, and forked near the middle".) Vanvactor was convicted of assault and battery, and fined one cent. He appealed, on principle no doubt; the appeal court reversed. Still, an Indiana teacher was convicted in 1853 for overpunishing a pupil. He whipped, punched, and kicked the student in the head for misspelling the word "commerce," and refusing to try again. A Texas teacher beat a 17 year old student 66 times for bringing brandied cherries to school and dividing them among the other pupils. This teacher was also convicted._7_/

The right of <u>parents</u> to punish, physically, was clear. The teacher -- and the school board -- had a similar right (up to a point). They stood "in loco parentis." The question was how far teachers, during the school day, filled the parents' shoes. The parents had a <u>general</u> right to chastise; the teacher's was "restricted to the limits of his jurisdiction and responsibility as a teacher." Other kinds of teacher power were in a kind of gray zone. Could a school, for example, forbid parties after school? Probably not -- because this invaded the <u>parents'</u> domain._8_/

Still, discipline was at the core of the school system. A Maine judge put it this way: "Free political institutions are possible only where the great body of the people are moral, intelligent, and habituated to self-control, and to obedience to lawful authority....To

become good citizens, children must be taught self-restraint, obedience, and other civic virtues."_9_/ The 19th century notion of schools was frankly "didactic"; schools aimed to teach "a traditional value system," and they "genuinely believed that their world view was one that could be shared by all right-thinking people."_10_/ Nothing is said, in the literature or the cases, about freedom of speech, or expression, or the dangers of conformity, which liberal judges of the 20th century made so much of. Conformity, or obedience, was a virtue, and democracy depended, not on the wilder excesses of "individualism," but on a kind of balanced self-control._11_/

A few cases questioned the limits of parental authority. How much must schools concede to the right of parents to decide what is best for their children? Compulsory education is itself, of course, a displacement of parental authority. In an Iowa case, in 1871, the school district allowed only so many absences a month, except for sickness and other good reasons. But one family kept the son home to prepare shrubbery for winter, do marketing, and take care of two cows. The daughter was kept home to keep the parents company. The school board's right to expel these students was sustained._12_/

At the end of the 19th century, schools began to require vaccinations before pupils could be admitted. A few parents -- Christian Scientists for example -- opposed vaccination on religious grounds. In one case, the parents felt that vaccination produced "a loathsome constitutional disease, which poisoned the blood." The court generally sided with the schools in these cases._13_/

Religion cropped up in a few other cases, too. In Donahue v. Richards 14_/ a 15 year old girl, Bridget Donahoe, who was Catholic, was expelled from school; she refused to read the King James version of the Bible. The Maine Supreme Court upheld the Board of Education, and its power to decide which books would be used in the schools. Generally speaking, 19th century courts went along with school prayers and Bible readings. In one Massachusetts case, decided in 1866, a young girl was suspended for refusing to bow her head during Bible readings and prayers. This was on her father's instructions. But the State Supreme Court affirmed; the school's practice was an "appropriate method" of reminding "both teachers and scholars that one of the chief objects of education . . . is to impress upon the minds of children and youth . . . principles of piety and justice."_15_/

19th century courts were less finicky than courts today about sectarian encroachments in school. Parents' rights were distinctly subordinate to the power of local majorities to mold the character of local schools. In Miller v. Board of Education (1887)_16_/, a school board rented rooms in the basement of a Catholic church and held classes there. Catholic children were required to attend mass before regular school hours. The Illinois court saw no violation of rights; neither did the Pennsylvania court in a case where a school district hired nuns to teach public school. The sisters wore habits, crucifixes, and rosaries while teaching._17_/ Yet 150 Catholic children were expelled in Brattleboro, Vermont, for missing school on June 4, 1874; they attended services for the feast of Corpus Christi._18_/

Even in the 19th century there were some ornery, claims-conscious parents, though probably fewer than today. Guy Taylor's father refused to sign his report card._19_/ Another father in Wisconsin refused to have his 12 year old son study geography._20_/ An Illinois father did not want his 16 year old girl to study bookkeeping; an Indiana father vetoed music study for his boy._21_/ A tempest in a Georgia teapot (1900), turned on whether a 13 year old girl could be forced to take part in a debate. (The topic was "Should Trial by Jury Be Abolished?") Her father thought the subject too difficult. The teacher refused to excuse her. Called on in class, the girl read a paper which ridiculed the teacher. The teacher refused to call on her again until she wrote a paper on the proper subject. The Georgia Supreme Court ultimately held that the punishment was proper._22_/

Pupils' Rights in the 20th Century _23_/

These cases were rarities. Student rights became a more common issue in the 20th century. Table 1 shows the number of published cases in which a student (or his parent as next friend) challenged the content of a school board rule or regulation, up to 1978. (As we explained, we excluded cases in which the rule challenged was not a school board rule, regulation or policy -- for example, those in which the school board merely enforced a state law. We also excluded cases about processes and procedures -- whether a student can be expelled, for example, without a hearing. In the broadest sense, these are part of the phenomenon we are investigating. But they present other complexities as well.)

As Table 1 shows, the rise was moderate until the '60s. In the 1950s, indeed, there were fewer cases than in earlier decades, though the numbers between 1900 and 1960 are so small that fluctuations probably have no meaning. Cases covered by this study ballooned after 1960. Not a single case before the Second World War presented an issue of student rights to a federal court. Yet of all the cases decided between 1899 and 1978 (261), 164 were federal -- 75% of the total. No less than 87 of these were dress code cases. More dress code cases were decided in the few years before and after 1970 than all student rights cases between 1899 and 1958. State court cases also increased; in the last decade of the survey they were more than double those of the previous decade.

The early 20th century cases carried on prior themes. The vaccination issue, for example, was still significant._24_/ In the 1940s and 1950s, the biggest issue was school rules restricting fraternities, sororities, and other student clubs. School board officials claimed that the clubs were bad for morale, and they objected to blackball procedures._25_/ Many states enacted anti-fraternity statutes._26_/

In the 1960s, rights of married students became an issue. Some schools limited the right of such students to take part in school activities, outside of class. Underlying these cases is a view of public schools as guardians of conventional morality -- or at least as places where traditional purity is maintained, even at some risk of unreality. In the 40s and 50s, teachers often smoked in secret, just

like their students, and many school districts regularly expelled married students, pregnant students and teenage fathers. Some districts even dropped married but pregnant schoolteachers as soon as they started to "show." _27_/

It is easy to write these policies off as simple bigotry or hypocrisy. They in fact imply a rather complex theory of what school is or ought to be. Cases on censorship of student publications also touch on the theme of schools as guardians of conventional morality. In Shanley v. Northeast Independent School District, Bexar County, Texas (1972) _28_/ five high school seniors were expelled for printing and giving out a newspaper called "Awakening," even though they prepared it off the grounds of the school, and there was nothing obscene or scurrilous about the newspaper (it did print a story which favored legalizing pot). The school district had a policy that allowed expulsion of pupils who tried to avoid "established procedure" for approval of "activities such as the production . . . and . . . distribution of . . . printed documents of any kind." A federal court upheld the constitutional rights of the students.

It is useful to specify a little more carefully exactly what sort of "conventional morality" the schools were guarding. In this regard, the cases about married students are crucial. The school boards gave various excuses for restricting these students. There was a deep fear of contamination. In Fremont, Ohio, by a Board of Education rule, any boy who "contributed to the pregnancy of any girl out of wedlock" could take part in no school activity except classes, for the rest of the year. A married student was similarly restricted, until graduation;

and the Junior-Senior prom was specifically off limits. One married student, who wanted to play baseball, challenged the rule in federal court and won._29_/

But why have such rules? The policy was stated in Indiana High School Athletic Association v. Raike (1975)._30_/ What was at stake was "integrity" and a "wholesome atmosphere." Married students were "bad examples" to the other athletes. They might discuss "marital intimacies" and similar "corrupting 'locker room talk.'" The court fortunately struck down the rule as unconstitutional.

The "locker room talk" of married students could hardly be worse than that of the unmarried, but what the school boards really feared was legitimating teen age sex. The ideal was chastity and strict morality, obedience and respect for authority. The atmosphere of school should be almost monastic -- at least officially. (A pregnant teacher, for example, like a married student, advertises sexuality too blatantly for these purposes). This view of the schoolhouse no doubt reflected the wishes of most parents. Morality and respect were ebbing, they felt. The schoolhouse must not ratify these unfortunate social developments.

Social pressures on schools and school authorities were nothing new. What was different now was the attitude of a handful of mavericks -- and judges. School was no longer a kind of surrogate home. At home children are socialized; children are trained. Parents do the job. Hence the right to correct the children. The schoolhouse, to a degree, was an extension of the home.

Of course, an extension of the home can easily become a substitute for the home, especially when the home falls down on its job. Hence compulsory education, and the development of institutions for juveniles who had no parents, or had bad parents. There are faint echoes in a few students' rights cases of this stage in the evolution of schoool law. We cite here a tiny, one-paragraph case out of Georgia (1918). The school had a rule that no pupil could attend any "show, moving picture show, or social function" except on Friday and Saturday night. Some students broke the rule by going to the movies -- with parental consent. They were about to be expelled. The courts refused to intervene._31_/

The modern cases are dramatically different. The simple statement in Tinker v. Des Moines Independent Community School District _32_/, that students do not "shed their constitutional rights...at the schoolhouse gate" is not as self-evident as appears at first glance; it is actually a startling shift in doctrine and attitude. By implication, and necessarily, it reduced the parental discretion of teachers and school boards. The central issue, then, became the question of authority over students as individuals. The power of schools was no longer derivative. After all, a parent can still force his kids to take off black armbands, despite "freedom of speech."

In the old cases -- vaccination, for example -- "student rights" were really peripheral. No doubt the students shared their parents' views, but they were very young, and the real conflict was between two zones of discretion, schoolhouse and home. Only in the 20th century,

do we face real student rights; that is, rights of young people as individuals -- backed, no doubt, by their parents, but nonetheless primarily asserting their own interests. Only the 20th century looks on the schoolhouse, not as an extension of the family, but as one social institution among many; and like other institutions (hospitals, prisons, business corporations), subject to general rules of law. School is no longer a parental or loco-parental zone. The very idea of student rights, in a sense, prejudges the issue.

To put it another way: the earlier cases did not focus on "rights," but on duties, that is on authority and its limits. The reader will immediately object, and quite rightly, that a duty is only the flip-side of a right. Every right implies a duty, and every duty implies something about rights. Very true, in the world of legal philosophy; but not necessarily true of law as a working reality. It was an important social shift to move from thinking about pupils as people whose main job was learning how to obey, to people owning personalities and a bundle of "rights."

Not that the courts were of one mind in 20th century cases. Students won some but by no means all of their cases._33_/ Until quite recently, in fact, pupils were consistent losers. In no decade did students win more than a third of their cases. In one decade, with only five reported cases, the students struck out completely: they were zero for five. Contrariwise, in the decade of the great dress code brouhaha, they won 48%, or almost half, of their cases.

Part II

Judge Not by Looks: The Dress and Hair Cases 34_/

Nothing is more startling in the history of student rights litigation than the explosion of dress and hair cases. These were decided almost entirely after 1966. The peak was in the early 1970s. They have since dwindled down to nothing.

Apparently, not a single reported case concerned this issue until 1921. The pioneer was a certain young Miss Valentine. She was one of six in her graduating class, in Iowa, all young women. The school provided caps and gowns. Three girls refused to wear the gowns because of an "offensive odor." The school held back plaintiff's diploma; she fought back and won._35_/ Two years later, in 1923, we hear of a rule in Clay County, Arkansas, against "transparent hosiery, low necked dresses, or any style of clothing tending toward immodesty in dress"; "face paint or cosmetics" were also prohibited. Eighteen year old Pearl Pugsley, who came to school with talcum powder on her face and was expelled, challenged the rule. The court ruled against her, with a testy comment about the "complaints of disaffected students."_36_/

These were isolated cases. The outburst of hair cases came between 1969 and 1973. They were mainly federal cases (by a three to one margin); they also raised constitutional issues, which were almost totally lacking in earlier cases. They owe something, perhaps, to

doctrines the Supreme Court developed -- the second flag salute case (Barnette, (1942) 37_/, for example, where the Supreme Court, for the first time, used the 14th Amendment against the action of a school board. Barnette was, of course, a religion case. Jehovah's Witnesses, refused, on religous grounds, to salute the flag. The case was rather 19th century in style (though not in outcome): the rights were parental, and the conflict was between zones of authority. And a full generation went by before the hair cases erupted.

Barnette, however, did point toward a new style of school case -- it was federal and constitutional, invoking broad principle. The 19th century cases were mostly local, dyadic. Almost none were strategic, or had the smell of a class action or test case. The cases of the 60's--the hair cases for example -- are cases about individual rights, personal life style, freedom from authority. But they address themselves to courts on the basis of fundamental principle. They use social means, and a socialized remedy, to advance an exaggerated form of individual right._38_/

The first federal hair case was Ferrell v. Dallas Independent School District (1966)._39_/ The school board here had ruled out "beatle-style" haircuts. A group of boys, members of a "combo," broke the rule (young Phillip Ferrell, for example, wore his hair "down to the ear lobe on the side and to the collar in the back"). The judge had no sympathy: he smelled "confusion and anarchy" in the classroom; the school officials, on the other hand, had "acted reasonably under the circumstances."

In another Fifth Circuit case (1969), _40_/ the judge was annoyed merely to find the case on his docket. It was a "lilliput of a lawsuit," which had "upset everybody in the school system," even threatening ticklish plans to desegregate schools in his Georgia county. And this "new school crisis," he said sarcastically, was over the "monumental question of the constitutional right of a student to wear a mustache." Why should a judge, "overloaded" with work, have to decide when the "fuzz or down above the lips of a teenager becomes a mustache?" The rule against mustaches and beards was "reasonable." Hairy students may be "distracting." Teachers have the right to an "atmosphere conducive to teaching and learning," without "unkempt faces" staring at them. If plaintiffs decided to "place their right to . . . hair . . . on their faces above getting an education," so be it.

This dash of cold water did not stop the flow of cases. Under the pressure of litigation -- not to mention the forces which led to the pressure in the first place -- judges began to weaken, and then did an about-face, at least in some circuits. Even in the fifth circuit, the hair issue was persistent and troublesome. A 15-judge panel was convened to decide, once and for all, on a unified rule, so that what was valid in Hillsborough County, Florida, should also prevail in "the Pampa, Texas, Independent School District." Long hair lost in Karr v. Schmidt (1972), but by a bare majority (8 to 7). _41_/

The district court had found as a "fact" that "the haircut rule causes far more disruption of the classroom . . .than the hair it seeks to prohibit." But this did not stop eight judges from holding otherwise. They were alarmed at the "burden" on federal courts. The

lawsuit in Karr took four full days of testimony at the trial level. It came up on appeal with a printed appendix more than 300 pages long. To put an end to all this, the court announced a "per se rule": hair regulations "are constitutionally valid," and cases should be immediately dismissed "for failure to state a claim."_42_/

This was a classic reaction to a problem of volume and legitimacy. The court laid down a flat rule to end disputes on the trial court level. I have elsewhere argued that this is a standard response to sudden intrusions of unwelcome, troublesome cases._43_/ The rule adopted in Karr is what we can call a rule of rejection. That is, it is a rule which flatly orders courts to hear none of a certain brand of case, or to throw out all cases that claim a certain cause of action. A rule of rejection, of course, solves the problem of volume -- if it is followed. Notice that it does not solve the social problem; it throws it out of court, in this case back into the lap of the school boards. A rule of rejection, of this type, thus tends to decentralize.

The hair problem was, of course, not confined to the Fifth Court. The Seventh Circuit, for example, decided a case Breen v. Kahl in 1969 _44_/. This was a clear victory for the student, Thomas Breen. The code of Williams Bay High School (Wisconsin) provided that:

> Hair should be washed, combed and worn so it does not hang below the collar line in the back, over the ears on the side and must be above the eyebrows. Boys should be clean shaven; long sideburns are out.

Breen was tossed out of school for violating this rule. The School Board defended its action with the usual argument about "distraction"; also, students whose "appearance conforms to community standards" tended to do better at school. But the court felt that the School Board had the burden of showing why it was interfering with "personal freedom," and had not met this burden.

Later cases in this circuit had mixed results. The judges did tend to agree that the issue was serious. The right to wear long hair was no joke, but a "vital" matter to some students, who were "willing to sacrifice" for their claim._45_/ For one judge, the issue was "simple disobedience parading as an assertion of constitutional rights."_46_/ Another, however, saw past "the length of a schoolboy's hair" to the vital core: whether the state had power to restrict a young person's freedom "to mold his own life style through his personal appearance."_47_/ There were mixed results in other circuits too. Circuits six, nine and ten joined five in adopting a rule of rejection._48_/ Circuits one, four, seven, and eight were pro-student. The third circuit flip-flopped. The Supreme Court might have put an end to the confusion, but it never did. It denied certiorari in no less than ten different hair cases._49_/

Nobody can read a judge's mind, but if we take text at face value, Tinker v. Des Moines Independent Community School District _50_/ deeply influenced many of the hair cases. Tinker was decided in 1969; almost every challenge to a school board since then cited it. Tinker of course was not a dress code case. The students wore armbands, during

school hours, as symbols of opposition to the war in Vietnam. Three students, including John Tinker, age 15, and his 13 year old sister Mary, were suspended from school for refusing to take these off. The Supreme Court, looking through the lens of constitutional principle, saw the schoolhouse as a very limited monarchy indeed. Students and teachers do not shed freedom of speech at the schoolhouse gate. Schools are not "enclaves of totalitarianism." The state may (of course) regulate school activity, to prevent disorder; but there was no evidence that the armbands caused disturbance. The regulation was unconstitutional.

Thus the majority: Justice Black delivered a furious dissent. He spoke of a "new revolutionary era of permissiveness . . . fostered by the judiciary." The decision, he felt, encouraged pupils to "defy and flaunt_51_/ orders of school officials to keep their minds on their own school work." Tinker was indeed about authority, if it was about anything at all. But if Tinker limited, in some ways, the authority of schools, it also by the same token increased the power of courts. Who would decide which board rules were "reasonable," and which ones restricted rights unreasonably? The courts, of course. The tests set out in Tinker cannot apply themselves automatically at the local level. If challenged, there must be some third party with authority to resolve the issues. This means (in this society) the courts, above all.

Of course, there is nothing new about this rule of reason. As we have seen, it goes back deep into the 19th century. It is the idea of the "limited monarchy." In the 19th century, however, the limits of

discretion were rarely tested, so that the rule of reason was essentially toothless. Mapping the boundaries did not present much of a problem, either for the courts or society at large. Only truly egregious violations of local norms were likely to evoke any challenge. When small minority groups protested on the basis of principle, the courts were generally unsympathetic.

On one level, the issue in the hair cases was the same: how far did the discretion of teachers and school boards go? From one standpoint, the best rule was a rule of rejection. But this did not fit the mood of potential litigants. No matter that 99% of all students and parents, or more, were willing to abide by the rules. It does not take more than a tiny minority, people with nerve and will, to stir up the waters, to create "disruption" (as school people see it), or to create a "litigation explosion" (as the judges see it).

Some courts tried, as we saw, to choke off litigation. But still the cases came. There were over 75 of them, between 1966 and 1974; as we said, they split about evenly down the middle. Curiously, neither students, lawyers, nor courts were ever clear exactly what in the constitution gave students the right to long hair. According to this or that plaintiff, dress codes violated the first, eighth, ninth, tenth and various pieces of the 14th amendment. Some courts muttered vaguely about "personal freedom," or the "penumbras" of various rights. In one case, a judge rhapsodized over the "commodious concept of liberty, embracing freedoms great and small," which apparently lurks inside the 14th amendment.

The other side, and their judges, were almost equally vague; and sometimes downright silly. One judge in Pennsylvania defended a rule against beards and mustaches because it prevented "psychological detriment" among high school boys who were still beardless. They would suffer because they were "unable to compete in the 'face race.'" (In the actual case, young Darius Lovelace won the right to get back into school, since his mustache was "practically imperceptible," and was "merely a natural growth, not a cultivated adornment.")_52_/ In a Florida case, the school board argued that grooming codes were valuable training in "norms and values"; they helped teach "that there are consequences if one deviates from the norm." The board also brought evidence that long-hairs had lower test scores than short-hairs, more disciplinary problems, and tended to be "socially maladjusted and to cluster in cliques."_53_/ In Parker v. Fry, there was the usual testimony about distraction and disruption, but Evans, a history teacher, moved the discussion to a higher plane when he testified that "Jesus had worn short hair and was clean shaven . . .in effect, . . . this was a rule that God established."_54_/ (This was balanced, perhaps, by a district judge, who noted that "portraits of six great jurists" were on the walls, starting with Moses, and that "some had mustaches and beards."_55_/) In still another case, the principal was afraid students "would polarize into camps of 'long hairs' and 'short hairs.'" Besides, if "boys were allowed to wear long hair so as to look like girls," there might be confusion over appropriate dressing room and restroom facilities."_56_/

After a few furious years of litigation, the hair cases died back; and no more was heard of them. The "explosion" passed as rapidly and

suddenly as it had come. Yet the issue was (legally speaking) never definitely resolved. Why then did the lawsuits stop?

One guess is that student activism faded in general. Nobody wears black armbands in the schools today. There are fewer issues and fewer issue-mongers. The end of the war in Vietnam may have cast its mysterious spell of calm here too. Some might add that the battle was simply won. Men wear their hair longer -- even school superintendents. Long hair no longer seems to bother anybody. Far worse was in store for schools than Beatle-style haircuts, and the schools have generally agreed, tacitly or otherwise, to tolerate all sorts of hair-style. In the Reagan age, there might yet be a backlash, but so far all is quiet.

Yet judicialization has not ended. Far from it. Even cases that rejected hair rights grudgingly conceded the general principle. The message was fairly clear: this issue may not be appropriate, but others are. The door is open -- has got to be open -- for students to assert their constitutional rights. In May, 1981, the San Francisco Chronicle reported on a lawsuit over a high school grade in an Advanced Algebra class. The student, Janice Anderson, 17, got a B+, but felt she deserved an A._57_/ The teacher refused. Appeals were taken within the school system of San Leandro. The Superintendent ordered the grade raised. This outraged the teacher, who filed a grievance with the San Leandro Teachers Association. The Association sued the Superintendent, on the grounds that he had infringed academic freedom. This time Janice lost. The case displays, in unusually graphic form, how the entire school system, from top to bottom, has been judicialized. There is more here than student rights. Note, too, that

while all parties took the case quite seriously, the case still seemed odd enough to catch the Chronicle's eye.

"Student rights" does not mean that courts will "run local school boards," or even that courts will be flooded with cases. These cases are and will be rare. There may be "bulges" in the case-load, from time to time -- some particularly acute social problem, or a particularly controverted one. These "bulges" (of hair cases, or prisoners' rights cases, or whatever) need not be permanent, and rarely are. Another lesson is that the "fall" or decline (of hair cases) masked a real change. The cases made their impact, no doubt, on local school boards. They saw that courts were not laughing at 17 year olds with funny hair. Judicial review of the "limited monarchy" was at least a possibility. Schools adjusted their rules -- and perhaps their behavior as well.

Thus the limited monarchy is more limited than ever. The cause, however, does not lie in court doctrine, but rather in social relations. Public attitudes toward schools are the fundamental fact. These are both deep and volatile. In any event, they are quite beyond the power of courts either to generate or subdue. These attitudes, of course, are also often in conflict. Judges in the hair cases plainly were of two minds, some stressed the function of schools in teaching "obedience"; some stressed "individuality" or "personal life-style," an idea which was (to say the least) foreign to the mind of the 19th century. But the notion of "individuality" or "life-style" is central to the very jurisdiction of the court, in these cases. Otherwise, suing authorities is not only a nuisance, it is bad modelling and bad training for the young.

It is dangerous, of course, to use reported cases to draw inferences about schools in general, or even what society thinks about its schools. But it is a temptation hard to resist. We start out, in the 19th century, with a picture of schools molding young minds, imbuing patriotism, morality, obedience. Pupils were, in a real sense, "passive vessels into which education is poured."

The quote is from an article about Tinker. The author observes (quite accurately) that Tinker rejects this approach._58_/ Is it too far-fetched to say that the tables are now turned? Now the school is the "passive vessel." It is supposed to avoid whatever smacks of "indoctrination." A case in point is Smith v. St. Tammany Parish School Bd. (1971)_59_/. A high school principal hung the Confederate battle flag in his office. Black students objected. The court agreed with them. The flag was a symbol of segregation, of "white racism in general." The judge would feel the same about "a Black Panther or a Black Power flag." The constitution forbids all such flags, in a "unitary school system where both white and black students attend school together."

Yet, of course, students can fly flags, wear black armbands, whistle or not whistle Dixie, distribute pro-pot or anti-pot literature, and sport whatever hair, hats, berets, buttons, and badges they wish. The constitution protects their freedom of expression, in and out of school. The same constitution frowns on symbols and manifestoes by the school -- whose job is "education," a neutral, professional job. This is at any rate the message of modern law.

The courts stand ready to enforce this view of schools. And judicialization here is part of a broader phenomenon: legalization. By this we refer, basically, to the stiffening of informal norms into networks of rules and regulations, and of informal procedures into procedures that look more or less like those of courts. The two phenomena, of course, interact. A judicialized system warns organizations that they had better legalize their own house, or the courts will force them to do it.

The passage from informal to formal norms, and from informal procedures to "due process," goes on throughout society. At the most abstract level, it is an inevitable outcome of the complexity of society and the growth of institutions. Sears Roebuck cannot hire and fire like a mom and pop grocery store. It has a "personnel department," which is inevitably more formal. Legalization also reflects the tremendous expansion of government between, say, 1870 and today. Government (state, federal, local) has its finger in many pies; organs that control government (courts, for example) grow alongside. Moreover, the scope of modern government blurs the line between what is "legal" and what is not. Leviathan is so large that it seems to swallow the whole ocean, and little fish, like Janice Anderson, begin to think thoughts that were once unthinkable. Like it or not, it is probably an irreversible process.

FOOTNOTES

1. Anderson v. State, 40 Tenn. (Head 3) 348 (1859).

2. 85 Ill. App. 82 (1899).

3. The first Massachusetts case: Watson v. City of Cambridge, 157 Mass. 561, 32 N.E. 864 (1893); the second, Sherman v. Inhabitants of Charlestown, 62 Mass. (8 Cush.) 160 (1851); the third, Hodgkins v. Inhabitants of Rockport, 105 Mass. 475 (1870). In an Illinois case: Board of Education v. Helston, 32 Ill. App. 300 (1890), a 14 year old was suspended when he refused to turn in a pupil who defaced the building with obscenities.

4. State ex rel. Bowe v. Board of Education, 63 Wis. 234, 23 N.W. 102 (1885).

5. Fertich v. Michener, 111 Ind. 472, 111 N.E. 605 (1887).

6. 64 N. H. 297, 9 Atl. 722 (1886).

7. Vanvactor v. State, 113 Ind. 276, 15 N.E. 341 (1888); Gardner v. State, 4 Ind. 632 (1853); Whitley v. State, 33 Tex. Cr. R. 172, 25 S.W. 1072 (1894).

8. See Dritt v. Snodgrass, 66 Mo. 286, 298 (1877); but compare Mangum v. Keith, n. 31 below.

9. Patterson v. Nutter, 78 Me. 509, 7 Atl. 273 (1886). Not every judge was keen on corporal punishment. The judge in Cooper v. McJunkin, 4 Ind. 290 (1853), warned of this "evil practice" with its "inherent proneness to abuse. The very act of whipping engenders passion and generally leads to excess."

10. David Tyack and Elisabeth Hansot, "Conflict and Consensus in American Public Education," Daedalus, Vol. 110, No.3, pp. 1, 5-6.

11. The point should not be carried too far. School authority was a shade ambiguous. Ninteenth century teachers were chronically underpaid, were often poorly educated, treated dismally by school authorities, and not much older than their pupils. They symbolized authority -- but sometimes weakly.

12. Burdick v. Babcock, 31 Iowa 562 (1871).

13. The quote is from Blue v. Beach, 155 Ind. 121, 56 N.F. 89 (1900). In a few cases, courts struck down vaccination rules on procedural or other technical grounds. Labaugh v. Board of Education, 177 Ill. 562, 52 N.E. 850 (1899); Potts v. Breen, 167 Ill. 67, 47 N.E. 81 (1897). A typical decision upholding vaccination is State ex rel. Cox v. Board of Education, 21 Utah 401, 60 P. 1013 (1900).

14. 38 Me. 379 (1854).

15. Spiller v. Inhabitants of Woburn, 94 Mass. (12 Allen) 127 (1866). Pfeiffer v. Board of Education, 118 Mich. 560, 77 N. W. 250 (1898) was another case which saw nothing wrong with Bible reading in the schools. But in Wisconsin the practice was declared unconstitutional, State ex rel. Weiss v. District Board of School District No. 8, 76 Wis. 177, 44 N.W. 967 (1890).

16. 121 Ill. 297, 10 N.E. 669 (1887).

17. Hysong v. School District, 164 Pa. 629, 30 Atl. 482 (1894).

18. Ferriter v. Tyler, 48 Vt. 444 (1876).

19. Bourne v. State ex rel. Taylor, 35 Neb. 1, 52 N.W. 710 (1892).

20. Morrow v. Wood, 35 Wis. 59 (1874).

21. Trustee of Schools v. People, 87 Ill. 303 (1877); State ex rel. Andrew v. Webber, 108 Ind. 31, 8 N.E. 708 (1886).

22. Samuel Benedict School v. Bradford, 111 Ga. 801, 36 S.E. 920 (1900).

23. There is a large literature on this subject. Stephen R. Goldstein, "The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis," 117 U. Pa. L. Rev. 373 (1969), though now somewhat out of date, was a fundamental treatment.

24. Eighteen out of the 40 cases in the first three decades were vaccination cases. To some extent the cases disappeared because State law removed the issue from local school boards. E.g. Mass. Ann. Laws, ch. 76, sec. 15; see Commonwealth v. Green, 268 Mass. 585, 168 N.E. 101 (1929). The validity of vaccination laws in general was settled in Jacobson v. Massachusetts, 197 U.S. 11 (1905).

25. See Coggins v. Board of Education of City of Durham, 223 No. Car. 763, 28 S.E. 2d 527 (1944). The Board of Education wanted each student to sign a pledge that he was "not a member...of any fraternity or society not approved by the school board." Failure to sign cost the student the right to hold student office, to work for school publications, act in plays, compete on athletic teams, or even

serve as "Cafeteria or Library helper." The court upheld the regulation. See also Wilson v. Abilene Independent School District, 190 S.W. 2d 406 (Texas, 1945).

Occasionally, the courts held that rules of this kind went beyond the power of the school board or principal. See, for example, Wright v. Board of Education, 295 Mo. 466, 246 S.W. 43 (1922).

26. An example is Iowa Code Ann. sec. 287.1: No pupil may "join. . .any fraternity or society. . .except such societies or associations as are sanctioned by the . . .schools."

27. Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974). The school boards defended their rules as "necessary to maintain continuity of classroom instruction"; the rules would also "protect the health of the teacher and her unborn child." The Supreme Court held the rules denied due process, because they used "irrebuttable presumptions that unduly penalize a female teacher for deciding to bear a child."

28. 344 F. Supp. 298 (N.D., Ohio, 1972).

29. Davis v. Meek, 462 Fed. 2d 960 (C.A. 5, 1972).

30. 329 N.E. 2d. 66 (Ind. App., 1975); in Romans v. Crenshaw, 354 F. Supp. 868 (S.D. tex, 1972) the rule applied even to students who had <u>been</u> married. The (successful) challenge came from a girl married

at 15 and then divorced. These rules about married students apparently go back some years. Two cases in the 1920's, Nutt v. Board of Education of Goodland, 128 Kan. 507, 278 Pac. 1062 (1929), and McLeod v. Mississippi ex rel. Colmer, 154 Miss. 468, 122 So. 737 (1929), both sustained the right of the married student to go to school. In the Mississippi case, the argument was made that "the marriage relation brings about views of life which should not be known to unmarried children"; but the court did not buy this: a proper marriage was "refining and elevating, rather than demoralizing." See also Board of Education of Harrodsburg v. Bentley, 383 S.W. 2d 677 (Ky, 1964). State ex rel. Thompson v. Marion County Board of Education, 302 S.W. 2d 57 (1957) held otherwise. Marion County school officials were worried about teen age marriages, and adopted a rule expelling married students for the balance of the term. The court accepted the view of the "experts" (high school principals) that student marriages led to confusion and disorder (how, one wonders?), especially "immediately after the marriage," when the "influence of married students on the other students is...greatest."

Board of Dir. of the School Dist. of Waterloo v. Green, 259 Iowa 1260, 147 N.W.2d 854 (1967) was another case in which (among other things) the Board was worried that married students might discuss "intimate details" in school.

See, in general, Anne Flowers and Edward Bolmeier, Law and Pupil Control (1964), 54-66, on the early cases.

31. Mangum v. Keith, 147 Ga. 603, 95 S.E. 1 (1918).

32. 393 U.S. 503 (1969).

33. For example, contrast Gambino v. Fairfax County School Board, 429 F. Supp. 731 (E.D., Va., 1977), aff'd, 564 Fed. 2d 157 (C.A. 4, 1977), in which students successfully fought a ban on an article ("Sexually Active Students Fail to Use Contraceptives") in the school newspaper, with Trachtman v. Anker, 426 F. Supp. 198 (S. D., N.Y. 1976), aff'd in part and rev'd in part, 563 Fed. 2d 512 (C.A. 2, 1977) (questionnaire passed out by the students, asking about attitudes about sex; the school called a halt, and was upheld).

Gay rights is another issue that evokes a defensive reaction from some school boards. In Fricke v. Lynch, (D.R.I., 1980), the court upheld the right of a high school senior (male, and gay), to go to his prom with a boy-friend. The first amendment, it seems, protected the expression of plaintiff's sexuality. This was at least no more far-fetched than the school's shop-worn reliance on what the court called "an undifferentiated fear or apprehension of disturbance."

The superintendent of schools in Sioux Falls, South Dakota, on the other hand, allowed a gay couple to go to the prom: "We've discussed this with our school attorney and we have no legal basis to keep the kid away." New York Times, May 13, 1979, p. 27, col. 6; May 24, 1979, sec. 3, p. 14, col. 1. Note how the superintendent used law as a legitimating device. In fact, the case law is skimpy and ambiguous, to say the least. Was the school attorney really so positive?

34. Dozens of law review articles treat the subject -- and at least one book, Harold H. Punke, Social Implications of Lawsuits over Student Hairstyles (1973).

35. Valentine v. Independent School District of Casey, 183 N.W. 434 (Iowa, 1921).

36. 158 Ark. 247, 250 S.W. 538 (1923). Apparently, only one other case dealt with student appearance or dress before the 1960s. The school board in Langdon, North Dakota, in 1931, banned students from wearing metal heel plates on their shoes, because the plates made noise, and also damaged the new hardwood floors at Langdon High. Murray Stromberg's parents argued that they had the right to decide what their boy should wear to school. Murray had a tendency to wear out the heels of his shoes; metal heel plates helped the shoes last longer. The North Dakota court upheld the school board rule as reasonable and proper. Stromberg v. French, 60 N.D. 750, 236 N.W. 477 (1931).

37. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1942), overruling Minersville School District v. Gobitis, 310 U.S. 586 (1940).

38. It is interesting, therefore, to compare the facts of the flag salute cases with Frain v. Baron, 307 F. Supp. 27 (E.D. N.Y. 1969), for example. Here students refused to recite the Pledge of Allegiance, because they thought the words "with liberty and justice for all" were "not true in America today." One student was "an atheist, who also

objected to the words 'under God.'" The students also "refused to stand during the Pledge, because that would constitute participation in what they considered a lie. They also refused to leave the room."

39. 261 F.Supp. 545 (1966).

40. Stephenson v. Wheeler County Board of Education, 306 F. Supp. 97, aff'd 426 F. 2d 1154, cert. den. 400 U.S. 957 (1970). There was, perhaps, a hidden race issue in this case. The students were black and their complaint, which talked about slavery, called mustaches and "facial hair growths" symbols of "masculinity" for black youths.

41. 460 F. 2d 609 (1972).

42. There were three separate dissents. Judge Wisdom (and four other colleagues) suggested the school board had violated the equal protection clause, the due process clause, and the first amendment. Judge Godbold (and three others, some of whom also joined with Judge Wisdom) thought circuit courts should leave the whole matter to the district courts. Judge Roney dissented on the "narrow ground" that a hair rule is unconstitutionally oppressive because it "follows" students "out of the school house door." That is, once hair is cut it is cut (unlike clothes, which are an on-and-off proposition). Hence the rule tells students what they can do outside of school as well as inside.

43. Lawrence M. Friedman, "Legal Rules and the Process of Social Change," 19 Stanford Law Review 786 (1967).

44. 419 F. 2d 1034 (1969).

45. Arnold v. Carpenter, 459 Fed. 2d 939 (1972).

46. Judge Stephenson, dissenting in Torvik v. Decorah Community Schools, 453 Fed. 2d 777 (1972).

47. Judge Lay, concurring in Bishop v. Colaw, 450 Fed. 2d 1069 .1971). School children "must be given every feasible opportunity to grow in independence, to develop their own individualities and to initiate and thrive on creative thought."

48. See, for example, King v. Saddleback Jr. College District, 445 Fed. 2d 932 (1971); Freeman v. Flake, 448 Fed. 2d 258 (1971).

49. On the results in the various circuits, see David P. Troup, "Long Hair and the Law: A Look at Constitutional and Title VII Challenges to Public and Private Regulation of Male Grooming," 24 Kansas L. Review 143 (1975), at 156, n. 110. On the denials of certiorari, see Troup, at 155, n. 106. Justice Douglas felt strongly that the Court should have heard these cases; see 404 U.S. 1042 (1972) (dissent in denial of certiorari in Olff v. East Side Union High School District, 445 Fed. 2d 932, C.A. 9, 1971).

50. 393 U. S. 503 (1969).

51. The justice actually meant "flout," of course.

52. 310 F. Supp. 579 (D.C.W.D. Pa. 1970). Dumbauld, the district judge, took the opportunity to fulminate on a number of other irrelevant issues: "the widespread dogma that children should be taught to read without learning the alphabet," and the "current vogue for 'polychromatic pedagogy'," which leads to the "squandering" of large sums of money on bussing. Id., 587-588.

53. Dawson v. Hillsborough County, Fla. School Board, 322 F. Supp. 286, 301 (1971); aff'd, 445 Fed. 2d 308 (1971).

54. Parker v. Fry, 323 F. Supp. 728 (D.C. E.D. Ark., 1971). Another teacher testified that "students who wore long hair were also most likely to violate the other rules; in other words, "bad attitude and long hair usually went together as a 'package deal.'" Id., 737.

55. Singleton, D.J., in Calbillo v. San Jacinto Junior College, 305 F.Supp. 857, 861 (S.D. Tex., 1969). This enlightened junior college, in the great state of Texas, had outlawed beards and "excessively long sideburns," and required "reasonable hair styles." Calbillo, suspended for wearing a beard, won immediate reinstatement.

56. Bishop v. Colaw, 450 F. 2d 1069 (8 Cir., 1971). The regulation, in St. Charles, Missouri, specified that hair was "to be worn clean, neatly trimmed around the ears and back of the neck, and no longer than the top of the collar...The eyebrows must be visible, and no part of the ear can be covered....The maximum length for sideburns shall be to the bottom of the ear lobe."

57. San Francisco Chronicle, May 28, 1981, p. 2, col. 2. The result, she said, "destroyed" her "faith in the legal system."

58. Stephen R. Goldstein, "Reflections on Developing Trends in the Law of Student Rights," 118 Pa. L. Rev. 612 (1970).

59. 316 F. Supp. 1174 (E.D. La., 1970), aff'd, 448 F. 2d 414 (5th Cir., 1971).

TABLE 1

YEARS	# OF CASES	#OF PUPILS	#CASES / #PUPILS	WON BY PUPIL ##	WON BY PUPIL %	FEDERAL COURT #	FEDERAL COURT %	MOST COMMONLY CHALLENGED RULE
1899-1908	11	15,503,110(1900)*	.7	3	27	0	0	vaccination (6)
1909-1918	14	17,813,852(1910)	.8	2	14	0	0	vaccination (7)
1919-1928	15	21,578,316(1920)	.7	5	33	0	0	vaccination (5)
1929-1938	13	25,678,015(1930)	.5	1	8	0	0	flag salute (3)
1939-1948	10	25,433,542(1940)	.4	2	20	0	0	anti-fraternity (5)
1949-1958	5	25,111,427(1950)	.2	0	0	1	20	anti-fraternity (2)
1959-1968	29	36,086,771(1960)	.8	3	10	8	28	married students (6)
1969-1978	164	45,909,088(1970)	3.6	78	48	118	75	dress code (87)

*The World Almanac and Book of Facts 1980, 184 (1979)